CENTURY LAND RESOURCES SDN BHD

v.

ALLIANCE BANK MALAYSIA BHD

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
ABDUL KADIR SULAIMAN JCA
MOHD GHAZALI YUSOFF JCA
[CIVIL APPEAL NO: Q-02-881-2003]
12 JULY 2004

CIVIL PROCEDURE: *Appeal - Adducing of fresh evidence - Point not raised before trial court - Not mentioned in memorandum of appeal - Whether point can be raised before Court of Appeal - Question of fairness to respondent and to trial judge*

LAND LAW: *Charge - Order for sale - Allegation by chargor/debtor that notice of demand included sums not actually due - That interest rate was varied by chargee/bank without prior notice to chargor - Whether chargor proved allegations - Whether chargor should have tendered to chargee 'actual' amount due*

LAND LAW: *Charge - Remedies of chargee - Order for sale - Notice of demand - Complaint by chargor that notice of demand claimed sum in excess of amount 'actually' due - Whether a ground for refusing order for sale - Land Code (Cap 81) (Sarawak), s. 148 - Whether notice of demand a condition precedent to making order for sale under s. 148 - Whether chargor's default in itself a condition precedent*

LAND LAW: *Charge - Remedies of chargee - Order for sale - Distinction between application under s. 148 Land Code (Cap 81) (Sarawak) and under s. 256 National Land Code 1965 - Choice of order - Condition precedent to making order for sale, whether notice of demand or chargor's default - Whether Low Lee Lian v. Ban Hin Lee Bank Bhd binding on applications for order for sale under s. 148 Land Code (Cap 81) (Sarawak) - Distinction between 'sums lawfully due' and 'alleged arithmetical miscalculations' - Whether 'arithmetical miscalculations' invalidate notice of demand*

This was an appeal from the decision of the High Court granting the plaintiff/bank an order for sale over some lots of land which had earlier been charged by the defendant/borrower to the plaintiff as security for certain loan and overdraft facilities. (The terms and conditions of the charge itself were expressed to be in addition and subject to the conditions as set out in the plaintiff's letter of offer which provided, *inter alia*, that the plaintiff shall be absolutely entitled to vary the rate of interest.) Before the lords justices of appeal, it was argued for the defendant that the appeal should be allowed because: (i) there was a failure to comply with O. 83 r. 3 Rules of the High Court 1980 ('RHC') in that the plaintiff did not provide the required particulars on interest by way of an affidavit; and (ii) the rate of interest was varied by the plaintiff without prior notice to the defendant (specifically, that the notice of demand served on the defendant included an item of interest for which no notice of variation was given).

Held (dismissing the appeal)

Per Gopal Sri Ram JCA delivering the judgment of the court:

[1] The defendant's first ground of appeal concerning O. 83 r. 3 RHC was neither raised in the court below nor mentioned in the memorandum of appeal. The Court of Appeal will not permit an appellant to take a point that has not been raised at first instance or that has not been pleaded in the memorandum of appeal. It is a matter of fairness, both to the primary judge and to the respondent. (p 798 f-g)

[2] The defendant was unable to prove that which it had alleged, namely, that the plaintiff's demand included sums that were not due. Indeed, having taken the position that the sums demanded were excessive, the defendant should have tendered to the plaintiff the amount that was 'actually' due. The defendant also had not, in its contemporaneous correspondence, disputed the sum claimed by the plaintiff in the latter's notice of demand, but had, instead, asked for more time to pay up. (p 799 b-d)

[3] A complaint that the sum claimed in a notice of demand is more than that which is actually due is **not** a ground for refusing an order for sale under s. 148 Land Code (Cap 81) (Sarawak). This is because a demand under a charge is **not** a condition precedent to an action under s. 148 thereof. The learned judge was, therefore, right in making the order for sale. (p 799 e-g)

Per curiam

[1] An application for an order for sale under s. 148 Land Code (Cap 81) (Sarawak) is to be differentiated from one under s. 256 National Land Code 1965 ('NLC'). This is because subsections (1) and (2) of s. 148 Land Code (Cap 81) (Sarawak) are constructed differently from s. 256(3) NLC. Under s. 148(2) Land Code (Cap 81) (Sarawak), the court, guided solely by the justice of the case, has the choice of making one of the three orders prescribed therein. Conversely, under s. 256(3) NLC, a court in the States of Malaya has **no** choice and 'shall' make an order for sale unless there is shown 'cause to the contrary'. Furthermore, under s. 256 NLC, a statutory demand in Form 16D is a condition precedent to the exercise of the court's power thereon, whereas, in the case of s. 148 Land Code (Cap 81) (Sarawak), it is the chargor's default, and **not** the notice of demand, that is a condition precedent to the making of an order for sale thereunder. (pp 800 h & 801 a-e)

[2] Hence, the courts in Sarawak must be vigilant with respect to these vital differences and **not** apply, uncritically, the decisions that were handed down under s. 256 NLC, *viz*, the decision of the Supreme Court in *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36. Indeed, it will be safer for the courts in Sarawak to rely on the cases decided under s. 55 Real Property Act of New South Wales (Stat 26 Vict No 9) which is closer to s. 148 Land Code (Cap 81) (Sarawak). (pp 801 f-g & 802 a-g)

[3] *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36 draws a clear distinction between 'sums lawfully due' and 'alleged arithmetical miscalculations'. The latter does **not** invalidate the notice of demand. (pp 802 h & 803 a-e)

*[**Bahasa Malaysia** Translation Of Headnotes*

Ini adalah rayuan terhadap keputusan Mahkamah Tinggi kerana membenarkan perintah jualan yang dipohon oleh plaintif/bank terhadap beberapa bidang tanah yang telah digadaikan oleh defendan/peminjam kepada plaintif sebagai jaminan kepada suatu pinjaman dan kemudahan overdraf. (Terma dan syarat gadaian dinyatakan sebagai tambahan kepada surat tawaran plaintif yang menetapkan, antara lain, bahawa plaintif berhak secara mutlak untuk meminda kadar faedah.) Di hadapan hakim-hakim rayuan, penghujahan telah dibuat untuk defendan bahawa rayuan harus dibenarkan kerana: (i) terdapat kegagalan untuk mematuhi A. 83 k. 3 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'); dan (ii) kadar faedah telah dipinda oleh plaintif tanpa sebarang notis kepada defendan (khasnya, bahawa notis tuntutan yang diserah kepada defendan mengandungi butiran faedah di mana tiada notis mengenai pemindaannya telah diberi).

Diputuskan (menolak rayuan)
Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah:

[1] Alasan pertama rayuan defendan mengenai A. 83 k. 3 KMT tidak dibangkitkan di mahkamah di bawah ataupun disebut dalam memorandum rayuan. Mahkamah Rayuan tidak akan membenarkan seseorang perayu untuk berhujah mengenai halperkara yang tidak dibangkitkan di mahkamah pertama ataupun yang tidak diplidkan dalam memorandum rayuan. Ini adalah soal keadilan kepada hakim utama dan juga responden.

[2] Defendan gagal membuktikan apa yang didakwanya, iaitu bahawa tuntutan plaintif mengandungi jumlah yang tidak terhutang. Malah, setelah menghujah bahawa jumlah yang dituntut adalah berlebihan, defendan sepatutnya memberitahu plaintif apakah jumlah 'sebenar' yang terhutang. Defendan juga, dalam surat-menyurat kontemporarinya, tidak membantah jumlah yang dituntut dalam notis tuntutan plaintif, sebaliknya meminta diberikan lebih masa untuk membayar balik.

[3] Suatu bantahan bahawa jumlah yang dituntut itu adalah melebihi dari jumlah yang sebenarnya terhutang bukan alasan untuk menolak perintah jualan di bawah s. 148 Kanun Tanah (Cap 81) (Sarawak). Ini kerana tuntutan di bawah gadaian bukanlah satu prasyarat kepada suatu tindakan di bawah s. 148. Yang arif hakim, dengan itu, betul apabila membuat perintah jualan.

Per curiam

[1] Suatu permohonan untuk perintah jualan di bawah s. 148 Kanun Tanah (Cap 81) (Sarawak) harus dibezakan dari permohonan di bawah s. 256 Kanun Tanah Negara 1965 ('KTN'). Ini kerana susunkata dalam seksyen-seksyen kecil (1) dan (2) s. 148 Kanun Tanah (Cap 81) (Sarawak) adalah berbeza dari apa yang terdapat pada s. 256(3) KTN. Di bawah s. 148(2) Kanun Tanah (Cap 81) (Sarawak), mahkamah, dengan dipandu semata-semata oleh keadilan sesuatu kes, mempunyai pilihan untuk membuat salah satu dari tiga perintah yang diperkatakan di situ. Sebaliknya, di bawah s. 256(3) KTN, mahkamah di Negeri-Negeri di Malaya tidak mempunyai pilihan dan "hendaklah" membuat perintah jualan kecuali terdapat "cause to the contrary". Selain itu, di bawah s. 256(3) KTN, suatu tuntutan statutori dalam Borang 16D adalah prasyarat kepada pelaksanaan kuasa mahkamah, sedangkan, dalam kes di bawah s. 148 Kanun Tanah (Cap 81) (Sarawak), kemungkiran penggadai, dan bukannya notis tuntutan, menjadi prasyarat kepada pemberian perintah jualan di bawah peruntukan tersebut.

[2] Dengan demikian, mahkamah-mahkamah di Sarawak harus sentiasa peka kepada perbezaan-perbezaan ini dan tidak melaksanakan, dengan secara rambang, keputusan-keputusan yang dibuat di bawah s. 256 KTN, yakni, keputusan Mahkamah Agung dalam *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36. Malah, adalah lebih selamat bagi mahkamah-mahkamah di Sarawak untuk bergantung kepada kes-kes di bawah s. 55 Real Property Act of New South Wales (Stat 26 Vict No 9), yang mana ianya adalah lebih hampir kepada s. 148 Kanun Tanah (Cap 81) (Sarawak).

[3] *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36 secara jelas telah membezakan antara 'jumlah yang terhutang secara sah' dengan 'pengataan salahkira arithmatik'. Perkara yang terkemudian tersebut tidak membatalkan notis tuntutan.

Case(s) referred to:
Campbell v. The Commercial Banking Co of Sydney [1879] 40 LT 137 ***(foll)***
Citibank v. Mohamad Khalid Farzalur Rahaman & Ors [2000] 3 CLJ 739 CA ***(refd)***
Citibank NA v. Jong Tze Khiok [1993] 4 CLJ 325 SC ***(foll)***
Co-operative Central Bank Ltd v. Meng Kuang Properties Bhd [1991] 2 CLJ 1144; [1991] 2 CLJ (Rep) 467 HC ***(refd)***
Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 SC ***(dist)***

Legislation referred to:
Rules of the High Court 1980, O. 83 r. 3
Land Code (Cap 81) (Sarawak), s. 148(1), (2), (3)
National Land Code 1965, ss. 254(1), 265

Real Property Act of New South Wales (Stat 26 Vict No 9) [Aust], s. 55

For the appellant/defendant - MS Sandhu; M/s Sandhu & Co
For the respondent/plaintiff - Wong Siong Tung (Robert Tang); M/s Chan & Gan

[Appeal from High Court, Kuching; Originating Summons No: 24-274-2001-I]

Reported by Gan Peng Chiang

JUDGMENT

Gopal Sri Ram JCA:
This appeal is directed against the judgment of Clement Skinner J in the High Court at Kuching, Sarawak granting the plaintiff, the chargee, an order for sale over the defendant's land. The facts are not in dispute and have been admirably dealt with by the learned judge.

By memorandum of charge dated 31 January 2000 the defendant charged its lands held under Lots 394, 395 and 396 to the plaintiff to secure a fixed loan of RM1,620,000 and an overdraft of the same amount. The annexure to the charge contains a cl. 30 which reads as follows:

> It is hereby agreed between the Chargor and/or the Customer and the Chargee that this Charge shall in addition to the terms and conditions herein be subject to the express conditions, if any, set out in the Chargee's Letter of Offer and in the event of any conflict, discrepancies of variance the express conditions set out in the Chargee's Letter of Offer shall prevail.

This clause necessitates us to refer to the relevant paragraph of the letter of offer dated 6 May 1997. That paragraph reads as follows:

> Notwithstanding the provisions relating to the rate of interest as hereinafter provided the Bank shall be entitled at any time and from time to time hereinafter to vary at its absolute discretion such rate of interest by serving a notice in writing of its intention and such amended rate of interest shall be payable as from the date specified in the said notice. Service of such notice may be affected by ordinary post.

Before us, learned counsel for the defendant argued two points either of which he said warranted the appeal being allowed. The first has to do with the non-compliance of O. 83 [rr. 3 and 6] of the Rules of the High Court 1980. The complaint is that particulars of interest in accordance with those rules were not provided by affidavit. Counsel for the defendant submits that the plaintiff's summons for sale ought therefore to have been dismissed. But, as pointed out by learned counsel for the plaintiff, this ground was not raised in the court below and finds no mention in the defendant's memorandum of appeal. We have said often enough that this court will not permit an appellant to take a point not raised at first instance or not pleaded in his or her memorandum of appeal. It is a question of fairness to the primary judge who has been deprived of an opportunity to express his views on the point. It is also a matter of fairness to the respondent, who, having succeeded on the grounds advanced in the court below has a legitimate expectation that he would not be confronted in the appeal with new grounds of attack which are raised without proper amendment to the memorandum of appeal. Accordingly, we think that there is nothing in the first point.

So far as the second point is concerned, the defendant's argument is that the order for sale ought to have been refused on the ground that the plaintiff had varied its interest rate without prior notice to the defendant. He argued that the notice of demand served on his client was defective because it included interest in respect of which no prior variation notice had been given.

Accordingly, sums had been demanded which were not due from his client. Counsel then submitted that following the Federal Court's decision in *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36, the demand served on his client was invalid and for that reason the order for sale should have been refused.

In our judgment these arguments are, for several reasons, bereft of any merit. In the first place, as submitted by Mr Wong of counsel for the plaintiff, with which submission we agree, since it is the defendant who alleges that undue sums were demanded, the burden of proving this fact is, in the ordinary way, on the defendant. Having examined the material in the record of appeal, we find that there is nothing to show that the demand contains sums not actually due. Therefore, the defendant has, in our opinion, plainly failed to establish its complaint with sufficient evidentiary backing. In the second place, the defendant, having taken the position that the sum demanded was excessive, should have tendered to the respondent the sum actually due. That is implicit from the decision of the Privy Council in *Campbell v. The Commercial Banking Co. of Sydney* [1879] 40 LT 137; [1879] 2 NSWLR 375 a case which we will return to later in this judgment. In the third place, the defendant, in contemporaneous correspondence, did not dispute the sum claimed by the plaintiff in the latter's notice of demand. Instead, it asked for time to pay. In fact, the defendant went further and asked for another loan from the plaintiff to clear its indebtedness under the facilities already granted. In the fourth place, the complaint that the notice of demand asked for more than what was actually due from the defendant is not a ground for refusing an order for sale under s. 148(1) of the Sarawak Land Code (Cap 81). This is because, as a matter of pure law, a demand under the charge "is not a condition precedent to an action under s. 148. On the contrary, it is the default on the part of the part of the defendants to make the payment on demand that constitutes a condition precedent to an application under s. 148(2)(c)." (per Jemuri Serjan CJ (Borneo) in *Citibank NA v. Jong Tze Khiok* [1993] 4 CLJ 325.) It follows that the learned judge was entirely correct in making the order for sale. That should really be the end of this matter. However, in view of the authorities cited to us in the course of argument and referred to by the learned judge in his judgment, we find it necessary to say a few words about applications for orders for sale under the Sarawak Land Code (Cap 81).

For present purposes we find it necessary to reproduce s. 148. It reads as follows:

148. (1) If default be made in the payment of the principal sum, interest or other moneys secured by a charge, or in the observance of any agreement, expressed or implied in any charge, the chargee may give to the chargor, his personal representatives or assigns, notice in writing that the chargee will resort to all available remedies unless such default be remedied.

(2) If the chargor fails to comply with the requirements of any notice lawfully given, the chargee shall be at liberty to apply to the High Court.

(a) for an order entitling him to enter into possession and to be registered as proprietor of the charged land;

(b) to receive the rents and profits of the charged land; or

(c) for the sale of the charged land, and the Court after hearing the evidence may make such order as in the circumstances seems just:

Provided that where a licence for the establishment of a planted forest has been granted under section 65B of the Forests Ordinance and a caveat has been lodged by the holder thereof against the land prior to the registration of the charge favouring the chargee

(i) no relief shall be granted under this section unless and until a copy of the application made by the chargee and all relevant documents in support thereof have been duly served on the holder of such licence; and

(ii) any order for the possession of the charged land or the sale thereof and any memorandum of transfer executed pursuant to section 150(3) shall be made expressly subject to the rights, interests and caveat of the holder of any licence for the establishment of a planted forest granted under section 65B of the Forests Ordinance unless such holder is the purchaser of the charged land.

(3) The notice under subsection (1) shall comply with the terms of the charge:

Provided that, without prejudice to section 145(4), if no period of notice for the purposes of this section is stipulated by the charge, not less than thirty days' notice shall be given.

Now, although s. 148(3) of the Sarawak Land Code is similar in effect to s. 254(1) of the National Land Code (see, *Citibank v. Mohamad Khalid Farzalur Rahaman & Ors* [2000] 3 CLJ 739), ss. 148(1) and (2) of the former are differently constructed from s. 256 of the latter. Under s. 148(2) of the Sarawak Code, the court is given a choice of making one of the three orders: the only consideration being that of justice in the circumstances of the case. Thus, if a chargee applies for an order for sale, the court, by virtue of

s. 148(2), may, if it does not in the circumstances seem just, refuse that order and in its stead make, for example, an order directing that the chargee receive the rents and profits from the charged land. Such an order may well be made in cases where the value of the charged property far exceeds the sum owing and the charged property is producing sufficient income to repay the loan within a reasonable time.

Contrast this with s. 256 of the National Land Code the terms of which are imperative. In essence it says that the court "shall" make an order for sale unless there is shown "cause to the contrary". So, the court is under a duty to make an order for sale when no cause to the contrary is shown. The Federal Court in *Low Lee Lian* emphasised this:

> As earlier observed, unless a chargor can bring himself within one of the three categories of cases set out earlier in this judgment, no cause to the contrary would be shown and the court **will be obliged** to make an order for sale. (emphasis added.)

A court in the States of Malaya does not therefore have a choice as to the type of order it may make when moved by a chargee under s. 256 of the National Land Code. There is only one order that it is permitted to make, namely, an order for sale. Further, a statutory demand in Form 16D is a condition precedent to the exercise of the court's power under s. 256. But, as may be seen from *Citibank NA v. Jong Tze Khiok*, it is the chargor's default and not the notice of demand that is a condition precedent to the making of an order for sale under s. 148.

The only reason we make these points is to draw attention to the danger of courts in Sarawak applying decisions under s. 256 of the National Land Code, such as *Low Lee Lian* without addressing the differences between the two provisions. They must keep in the forefront of their minds that the section they are dealing with is very different from that applied by the courts in the States of Malaya. Although in the present case the learned judge appears to have proceeded on the assumption that *Low Lee Lian* was binding on him (when it is not), it must be said in fairness to him, that in the final analysis, he hearkened to the peculiar words of s. 148 of the Sarawak Land Code and proceeded entirely along the correct lines of logic and the law to arrive at his conclusion. His judgment cannot therefore be subjected to any criticism in this regard.

In our judgment, the courts of Sarawak are on safer ground in relying on cases decided under the parallel section in the New South Wales legislation which is closer to s. 148. The similarity may be seen from the case of *Campbell v. The Commercial Banking Company of Sydney* where the Privy Council had to interpret s. 55 of the Real Property Act of New South Wales (Stat. 26 Vict. No. 9) which reads:

> Mortgage and incumbrance under this Act shall have effect its security, but shall not operate as a transfer of the land thereby charged, and in case default be made in the payment of the principal sum, interest, annuity, or rent charge, or any part thereof thereby secured, or in the observance of any covenant expressed in any memorandum of mortgage, or of incumbrance registered under this Act, or that is hereinafter declared to be implied in such instrument, and such default be continued for the space of one calendar month, or for such other period of time its may therein for that purpose be expressly limited, the mortgagee or incumbrance may give to the mortgagor or incumbrancer notice in writing, to pay the money then due or owing on such memorandum of mortgage or of incumbrance or to observe the covenants therein expressed or implied, as the case may be, and that sale will be effected unless such default be remedied, or may leave such notice on the mortgaged or incumbered land, or at the usual or last known place of abode in the colony of the mortgagor or incumbrancer, or other person claiming to be then entitled to the said land, or with his known agent.

The Privy Council there was faced with very much the same argument as advanced by the defendant's counsel in this case, namely, that the plaintiff's notice had demanded too much. This is how the Board dealt with it:

> As to the first of these grounds, the learned judges of the Supreme Court have held, and in their Lordships' opinion have correctly held, not only that a notice under the Act is not bad because it demands more than is due, and that the jury should have been so instructed (a ruling which affects principally the finding on the second issue), but that **where a demand is made for a larger amount than that which is really due, such demand does not do away with the necessity for tendering what is actually due**, unless there is at the same time refusal to receive less. (emphasis added.)

We think that the same approach should apply to cases under s. 256 of the National Land Code. It must be borne in mind that in *Low Lee Lian*, the Federal Court when approving *Co-operative Central Bank Ltd v. Meng Kuang Properties Bhd* [1991] 2 CLJ 1144; [1991] 2 CLJ (Rep) 467, was contemplating a case where the chargee makes a demand for sums not lawfully due. In *Meng Kuang Properties Bhd* a demand was made for default interest, which according to the terms of the loan agreement and the annexure to the charge was not payable by the chargor. Very recently we had a case in this

court in which we upheld the dismissal of foreclosure proceedings on the ground that the Form 16D was bad because it demanded the estimated costs of the enforcement proceedings, an item not provided for by the annexure to the charge and therefore not lawfully due from the chargor to the chargee. That is the sort of case which the Federal Court had in mind in *Low Lee Lian*.

But, suppose, for a moment that a chargee miscalculates the interest due in the Form 16D notice, does that invalidate the notice? We do not think that it does. We think that the judgment in *Low Lee Lian* draws a clear distinction between sums lawfully due and alleged arithmetical miscalculations. That is why we find that in *Low Lee Lian* itself, an allegation that the chargee "had varied the rate of interest without giving any notice of the same to the appellant" was held not to amount to cause to the contrary. If, therefore, a chargee demands a greater sum which includes a varied rate of interest of which no notice is given despite a contractual provision to the contrary, that is nevertheless a lawful demand. And the chargor should, if he considers the amount demanded to be excessive, tender payment of the sum actually due. In that instance, if the chargee refuses to accept the tender of a lesser sum does the Form 16D notice then, and then only, does the demand become unlawful. If this be not the case, errant borrowers would, by proving that the sum demanded in a Form 16D notice is excessive by a few ringgit, successfully resist an application for an order for sale and thereby escape the hand of justice. There is nothing in *Low Lee Lian* that sanctions such a result. Quite the opposite.

We have already expressed our views on why this appeal should fail. All that remains is setting out the formal orders made on 6 July 2004 when we disposed of this matter. This appeal was dismissed and all those orders usually consequent upon a dismissal were made.